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In the
Supreme Court of the United States

OCTOBER TERM, 1968

No. 1133

ELMER E. MILLS and LOUIS SUSMAN,
Petitioners,

vs.

THE ELECTRIC AUTO-LITE COMPANY, MERGENTHALER LINOTYPE COMPANY and AMERICAN MANUFACTURING COMPANY, INC.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

To the Honorable, The Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Respondents pray that the petition for writ of certiorari be denied.

QUESTIONS PRESENTED

The four questions listed by petitioners are founded upon a distortion of the opinion of the Court of Appeals. There is but one question presented:

Was the Court of Appeals correct in reversing an interlocutory summary judgment as to liability and remanding the case for trial with the burden placed upon the defendants on the issue of causal relationship?

STATEMENT OF THE CASE

Petitioners' statement of the case is inadequate and misleading. Contrary to their assertion, the Court of Appeals did not deny them a federal remedy, but merely reversed an interlocutory and partial summary judgment order and remanded the matter for trial. An accurate description of the proceedings below is a complete answer to the petition.

Petitioners, plaintiffs below, attack and seek to invalidate the 1963 merger of The Electric Auto-Lite Company ("Auto-Lite") with Mergenthaler Linotype Company ("Mergenthaler").

Prior to the merger, each Auto-Lite shareholder received a 108 page proxy statement containing extensive financial and other business data concerning both Auto-Lite and Mergenthaler. The proxy statement also contained the independent opinion of Standard Research Consultants that the merger terms were fair to the Auto-Lite shareholders.

The proxy statement set forth that Mergenthaler owned 54% of the outstanding Auto-Lite stock, that American Manufacturing Company ("American") and its president, Mr. Wattles, owned 33.41% of the outstanding Mergenthaler stock, and that no other person owned more than 10% of the stock of either Mergenthaler or Auto-Lite. It also stated that Mergenthaler intended to vote its stock in favor of the merger. The proxy statement did not refer to an earlier proceeding before the SEC in which American

obtained an exemption from the Investment Company Act of 1940. During the course of those proceedings, American had stated that the directors of Auto-Lite were nominees of Mergenthaler.

Petitioners' complaint attacking the merger is divided into three counts. The District Court granted petitioners' motion for partial summary judgment as to one count only, Count II. That count charges that the sole purpose of the merger was to effectuate a "fraudulent plan" to take over Auto-Lite's business at a loss to Auto-Lite of over $31,000,000.00. Count II further charges that no Auto-Lite director was independent and free from the control and domination of Mergenthaler and that the proxy statement concealed that fact. Petitioners seek damages allegedly resulting from the merger and to void the merger.[1]

In May, 1965, petitioners moved for summary judgment as to a portion of the claim set forth in Count II on the ground that the proxy statement had failed to disclose the "controlling" relationships between Auto-Lite, Mergenthaler and American. This motion was granted on November 15, 1965.

On February 14, 1966, the District Court rendered a supplemental opinion holding that its November 15, 1965 opinion was not a summary judgment ruling, but merely a "specification of facts appearing without controversy" pursuant to Rule 56(d). The Court further held, pursuant to the mandate of *J. I. Case Co.* v. *Borak*, 377 U.S. 426 (1964), that it was required to determine whether there was

[1] Petitioners claim that the merger terms were grossly unfair. However, the value of the investment of the Auto-Lite shareholders who converted their preferred stock in the merged company to common has more than doubled since the merger.

a "causal connection" between the deficiency in the proxy statement and the merger.[2]

Petitioners thereafter filed a motion for "supplemental" summary judgment asserting that a causal relationship had been established since some of the votes obtained through the proxy solicitation were necessary to achieve the two-thirds majority required for approval of the merger. Again, petitioners' motion was addressed only to the claim of an alleged omission from the proxy statement and not to the charge that respondents participated in a "fraudulent scheme."

In opposition to this motion respondents submitted affidavits of each Auto-Lite director stating that he was not dominated by Mergenthaler and that he exercised independent judgment in analyzing and approving the merger. The Standard Research opinion as to the merger terms was filed with the Court, as was the current opinion of a leading securities analyst who stated that the merger ratio was fair to the Auto-Lite shareholders. Other affidavits were also filed, including that of an independent accounting firm to the effect that the financial statements in the proxy statement fairly reflected the results of the operations of Auto-Lite and Mergenthaler in accordance with SEC regulations.

On September 26, 1967, the District Court *sua sponte* injected antitrust criteria into the case in an attempt to resolve the issue of causal relationship. The Court ruled that

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[2] This opinion, omitted from the petition, is attached as an appendix. Following the limited hearing held pursuant to this order at which petitioners testified that they were not misled by the proxy statement, the Court set the matter for trial on the ground that it was required to view the entire merger transaction in order to decide the case. (Hearing, June 16, 1966, Tr. 31-32.)

"causal connection" had been established because the merger was "conglomerate" and "inherently dangerous to a healthy economy." (Pet. App. 21a.) This antitrust theory was not pleaded or argued, nor was it supported by any proof. Petitioners in effect abandoned this antitrust theory on appeal.

Although the District Court granted petitioners' motion for partial summary judgment as to liability, it refused to hold that the merger was necessarily void. Petitioners filed a cross-appeal on this issue.

The Court of Appeals agreed with the District Court that the proxy statement failed to bring out adequately the relationship between the Auto-Lite board members and Mergenthaler. The Court noted that the proxy statement contained information which would indicate, at least to those aware of the corporate process, that Mergenthaler had the power to select a majority, if not all, of the Auto-Lite board members. (Pet. App. 6a.) The Court concluded, however, that Mergenthaler's controlling 54% stock interest in Auto-Lite was not given "similar emphasis" as was the board's recommendation that the shareholders approve the merger. (Pet. App. 8a-9a.)

The Court of Appeals reversed the summary judgment order on the ground that an issue of fact existed as to the causal relationship between the deficiency in the proxy statement and the merger. (Pet. App. 10a.) The Court placed the burden upon respondents to show at trial that the merger would have been approved even if the proxy statement had not been deficient in the respect found. (Pet. App. 11a.)

The Court of Appeals did not rule on petitioners' contention that the merger was void since, under its holding, that issue was premature. (Pet. App. 12a.)

REASONS FOR DENYING THE WRIT

The petition should be denied for three basic reasons:

1. No Final Judgment Is Involved.

Petitioners have not been "denied a remedy"; the case has been remanded for trial and respondents, defendants below, have been given the burden of proving the lack of causal relationship. The petition is premature since the parties may seek review upon a full record after all issues have been resolved at trial.

2. The Court Of Appeals Was Correct In Remanding The Case For Trial.

Given the complex factual setting of this case, the Court of Appeals properly held that summary judgment was inappropriate. It correctly determined that the questions of causal relationship and damages presented by the facts of this case require a trial on the merits.

3. There Is No Conflict Among The Circuits.

"Causal relationship" has uniformly been held to be an issue best resolved in the factual setting of the entire case. The Court of Appeals followed this Court's ruling in *Borak* in determining that ". . . the causal relationship of the proxy material and the merger are questions of fact to be resolved at trial."

I.

This Court Should Not Review An Interlocutory Ruling Reversing A Partial Summary Judgment Order.

Petitioners claim to have been "denied a remedy." (Pet. 2, 8.) They further claim that the Court of Appeals has superimposed common law standards upon claims under the Securities Exchange Act. (Pet. 8-9.) These contentions are not valid and result from a distortion of the decision of the Court below.

Far from denying petitioners a remedy, the Court of Appeals has remanded this case for trial and has placed the burden upon respondents to rebut the inference that the deficiency in the proxy statement had an effect on the vote approving the merger. At trial, respondents must show that the merger would have received a favorable vote even if the proxy statement had not been deficient in the respect found.

Because petitioners *are* afforded a remedy is precisely why this Court should not review the decision of the lower court at this time. This Court does not ordinarily grant certiorari to review non-final judgments. *Cobbledick* v. *United States,* 309 U.S. 323, 324-25 (1940); *American Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.,* 148 U.S. 372, 384 (1893). Lack of finality alone is sufficient reason for denying certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.,* 240 U.S. 251, 258 (1916).

This Court recently denied certiorari in *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.,* 389 U.S. 327, 328 (1967) in the following language:

> "Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. . . . (Citing *Hamilton-Brown Shoe Co., supra.*)"

An order denying a motion for summary judgment is not appealable. *Switzerland Cheese Ass'n, Inc.* v. *Horne's Market, Inc.*, 385 U.S. 23, 24-25 (1966). Since the effect of the holding of the Court of Appeals was to deny petitioners' motion for partial summary judgment, this Court should not review this case at this time.

Review of the Court of Appeals' decision at this point will not expedite this case. Even if petitioners prevail, the trial court must still resolve questions of damages and appropriate relief which will require extensive hearings. This Court can best review a decision if it has before it a complete record, containing all findings and conclusions, all rulings, and the final judgment of the Court below. Review by this Court is more properly made upon a complete record, rather than in a piecemeal fashion.

It is particularly inappropriate for this Court to review complicated litigation at the summary judgment stage. This Court warned in *Kennedy* v. *Silas Mason Co.*, 334 U.S. 249, 256-57 (1948):

> "... [S]ummary procedures, however salutory where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice."

II.

The Holding Of The Court Of Appeals On The Issue Of Causality Is Correct.

Contrary to petitioners' assertion (Pet. 10), the Court below followed this Court's decision in *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431 (1964):

> "In addition, some of the petitioners argue that the merger can be dissolved only if it was fraudulent or non-beneficial, issues upon which the proxy material

> would not bear. But the causal relationship of the proxy material and the merger are questions of fact to be resolved at trial, not here."

Both the trial and reviewing court in this case agreed that causality is indispensible to a claim asserted under the Securities Exchange Act. The Court of Appeals merely differed with the lower court in its definition of causal relationship and rejected, without discussion, the "anti-trust" theory advanced by the District Court and abandoned by petitioners on appeal. It also rejected petitioners' assertion that causality could be conclusively established by a mechanical showing of no more than that some proxies obtained through the solicitation were needed for approval of the merger.

The Court of Appeals held, in effect, that petitioners had established a prima facie case, but ruled that defendants should have an opportunity to show, by a preponderance of the probabilities, that the affirmative votes would have been obtained even if the proxy statement had not been deficient in the respect found.

Petitioners distort the opinion of the Court of Appeals when they state that it created a "conclusive presumption" that no shareholder will vote against a fair merger. (Pet. 6, 12, 15.) It is difficult to perceive how petitioners draw this conclusion when the opinion of the Court of Appeals specifically places the burden upon defendants to show that the deficiency in the proxy statement did not cause the favorable vote on the merger. Further, the Court did not hold that fairness alone is dispositive of the issue of causal relationship. It merely ruled that fairness "does bear" upon the causation issue. (Pet. App. 11a.)

Petitioners further misstate the proceedings below when they assert that the opinion of the Court of Appeals rests upon "common law fraud." (Pet. 6, 9, 11.) Far from

relying upon "common law" standards, the Court of Appeals applied strict standards under the Securities Exchange Act in holding that the proxy statement was deficient. If the opinion of the Court of Appeals is novel in any respect, the novelty is found in the Court's holding that a proxy statement is insufficient, not because it does not disclose all of the pertinent facts, but because certain facts are given more emphasis than others. The Court did not "skirt" or "thwart" the federal requirements of full disclosure, but applied standards far stricter than those imposed by the common law.[3]

The decision of the Court of Appeals to remand this case for trial does not erect an insuperable barrier to relief as petitioners urge. In considering the entire merger transaction, including its fairness, the trial court is directed to fashion appropriate relief, if any, in light of all the circumstances. This is hardly a novel approach to complicated equity cases.

Petitioners' argument that an inquiry into the issue of fairness will spell the death-knell of all class and derivative suits is preposterous. Any court must inquire into this issue at least in fashioning appropriate relief. If petitioners are not in fact "in a position to undertake a full-dress trial to determine the fairness of [the] merger" (Pet. 18), it is difficult to perceive how the trial

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[3] If this Court were to grant certiorari, it would be necessary to determine as a threshold question the correctness of the ruling below that the proxy statement was deficient because of its failure to emphasize to a greater degree the relationship between Auto-Lite and Mergenthaler. No other deficiency has been found to exist in the 108 page proxy statement. Review of this issue, along with the other issues in this case, should properly await a full development of the facts at trial and a final judgment.

court would proceed to fashion relief in the event it determines that respondents are ultimately liable in this litigation.

Petitioners erroneously contend that the Court of Appeals assumed "that dissolution is the only proper remedy for a consummated merger, and that dissolution is too harsh a remedy for the wrong." (Pet. 20.)[4] Nowhere in the opinion of the Court of Appeals can there be found a holding that dissolution is the only remedy for a consummated merger. The Court stated that nothing in the Securities Exchange Act required the setting aside of a consummated corporate transaction, but the Court further held that the issue of dissolution was not properly presented until the completion of a trial on the merits. (Pet. App. 11a-12a.)

It is apparently petitioners' position that they are entitled to a judgment setting aside the merger without ever making a factual showing of damages or that the merger was in any way unfair; they claim that any other result would eliminate small shareholder actions. (Pet. 19.) Petitioners would have courts invalidate all corporate transactions where proxy materials are deficient in some respect upon the bare-bone allegations of a complaint. The securities laws are not designed to reach such an extreme result, and the Court below correctly determined that a finding of causality, based upon all the facts as developed at trial, is the only way to effectuate the policies underlying the securities laws. The Court of Appeals properly rejected petitioners' *per se* theory that liability must follow no matter what the circumstances.

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[4] Petitioners' statement (Pet. 20) that this issue was "untendered" is surprising since petitioners filed a cross-appeal raising this exact issue.

Complex securities cases cannot be likened to personal injury actions where the issues of liability and damages are ordinarily independent of one another. It is settled that cases raising complicated factual and legal issues are usually not suitable for summary judgment motions on the part of plaintiffs or defendants. By directing that causal relationship and damages be determined in light of the entire merger transaction, the Court of Appeals did not establish any new or far-reaching precedent adverse to claims made under the Securities Exchange Act. Issues such as fairness and damages clearly must be inquired into by the trial court in disposing of this matter. Petitioners, who instituted this action, have in no way been prejudiced by the mandate of the Court of Appeals that this case proceed to trial on the matters raised in the complaint.

Petitioners' reliance upon *Securities and Exchange Commission* v. *National Securities, Inc.*, 89 S. Ct. 564 (1969), is misplaced. (Pet. 10, 12, 19.) In that case, this Court decided that the McCarran-Ferguson Act does not bar a suit under the Securities Exchange Act attacking an insurance company merger, and that a merger constitutes a sale within the meaning of Section 10(b) of the Securities Exchange Act. That case is in no way inconsistent with the opinion of the Court below. In *National Securities*, this Court remanded the case for trial, precisely what the Court of Appeals did here.

Petitioners' suggestion (Pet. 10) that the Court of Appeals would have decided this case differently had its decision not preceded the opinion in *National Securities* is erroneous. The decision in *National Securities* on the Section 10(b) issue was fully anticipated by the Court of Appeals for the Seventh Circuit. *Dasho* v. *Susquehanna Corp.*, 380 F.2d 262, 269 (1967).

Unlike the lower court's decision in *National Securities,* petitioners have not been held to be without a remedy under federal law. The Court of Appeals here merely held, following this Court's opinion in *Borak,* that petitioners' relief, if any, would have to await a factual resolution of the issue of causal relationship at trial.

III.

There Is No Conflict Among The Circuits.

All cases subsequent to *Borak* hold, consistent with that ruling and the ruling of the Court below, that causal relationship, unless totally lacking on the basis of the facts pleaded, must be resolved at trial. In *Miller* v. *Steinbach,* 268 F.Supp. 255, 274 (S.D.N.Y. 1967) and *Eagle* v. *Horvath,* 241 F. Supp. 341 (S.D.N.Y. 1965), the issue of "causal relationship" was held to raise triable issues of fact. Causality was referred to in *Eagle* as a " . . . material, factual question to be resolved at trial. It is not a question that can properly be adjudicated on this motion for summary judgment." (241 F. Supp. at 344.)

A case principally relied upon by petitioners (Pet. 11, 12, 14), *Laurenzano* v. *Einbender,* 264 F. Supp. 356 (E.D. N.Y. 1966), held only that a *defendant's motion to dismiss* would not be sustained where the court was unable to conclude that the proxy material was "functionless in the consummation of the transactions." (264 F. Supp. at 361-62.) In sustaining the complaint, the court noted that the ultimate resolution of the case depended upon the facts disclosed at trial and that it might develop that "the proxy solicitation was in fact of no significance." (264 F. Supp. at 362.) *Laurenzano* is in no way inconsistent with the holding in the instant case that the issue of causal relationship must be resolved following a trial on the merits.

Contrary to petitioners' assertion (Pet. 16), *Eastside Church of Christ* v. *National Plan, Inc.*, 391 F.2d 357 (5th Cir.), *cert. denied*, 393 U.S. 913 (1968), is not "in square conflict" with the decision below. That case related to neither a proxy statement nor a merger. No issue of causal relationship was involved. Rather, the court had before it a bond sale effected by an unregistered dealer of securities with respect to a single customer. The considerations are totally different where a court is requested to void a merger consummated almost six years ago involving thousands of shareholders. Indeed, the Court in *Eastside* expressly limited its holding to two-party transactions. (391 F.2d at 363.)

The cases which have considered the problem of "fairness" in securities litigation have rejected the idea of *per se* liability. In *Robbins* v. *Banner Industries, Inc.*, 66-67 CCH Sec. L. Rptr. ¶91,861, pp. 95,952-53 (S.D.N.Y. 1966), the court noted, "There is no insurer liability under section 14(a)." In *Cohen* v. *Colvin*, 266 F. Supp. 677, 685 (S.D.N.Y. 1967), the court denied relief where the corporation was in no way harmed by the corporate action taken.

The decision of the Court of Appeals does not establish sweeping guidelines which will affect future securities litigation or "a broad range of cases arising . . . under other federal regulatory statutes requiring full disclosure and fair voting." (Pet. 8.) It concerns the wording of a single proxy statement within the factual context of a particular merger. The Court below made a forthright attempt to deal with the complex questions raised by the unique procedural posture of the case. In remanding the case, the Court of Appeals has done nothing more than

direct the trial court to view the entire factual context of the merger in a trial setting and fashion relief, if appropriate, in conformity with the policy of the securities laws and the dictates of a court of equity.

CONCLUSION

For the above reasons, the petition should be denied so that the case may return to the District Court and proceed to a trial on the matters raised in the complaint.

Respectfully submitted,

ALBERT E. JENNER, JR.
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April 4, 1969

APPENDIX

OPINION OF DISTRICT COURT

Memorandum Opinion and Order, dated February 14, 1966:

This matter comes before me for ruling on defendants' motion to vacate orders entered on November 15, 1965, and November 29, 1965. In the alternative, defendants seek to have those orders amended pursuant to the provisions of Title 28, § 1292(b), U.S.C., so that an appeal may be perfected.

The following action has been taken in this case to date: On November 15, 1965, I determined that as a matter of law there had been a violation of the disclosure requirements of §14(a) of the Securities Exchange Act of 1934. The parties were notified of my finding in a memorandum opinion, which is a part of this record. On November 29, 1965, I appointed William J. Friedman, an eminent attorney, to serve as a Master, pursuant to Rule 53 of the Federal Rules of Civil Procedure.

Although I indicated to the parties in a memorandum opinion and order, which is part of the record, that the function of the Master would be to assist the Court in determining appropriate remedial action, I also advised the parties that the order of reference would be subject to supplemental rulings. The purpose of these supplemental rulings would be to set up guide lines with respect to the procedure in the Master's investigation. Subsequently, I held a conference to enable the parties to make suggestions about the specific function of the Master.

It is worthwhile to restate the issues presented and the conclusions I have drawn thus far. The threshold question was whether there had been a violation of the disclosure requirements of Rule 14(a) of the Securities Exchange Act of 1934. I determined that the failure to disclose the fact that American Manufacturing Corporation and Mergenthaler Corporation controlled the management of Electric Auto-Lite Company, as determined by the Securities Exchange Commission, constituted the omission of a material fact from the proxy statement.

With respect to the controversy before me, it is clear that I have jurisdiction to provide appropriate relief for violation of the disclosure requirements of §14(a) of the Securities Exchange Act of 1934. As stated by the Seventh Circuit in *Borak* v. *J. I. Case,* 317 F.2d 838, 848, (1963):

> "• • • The obvious purpose of §14(a) is the protection of the right of shareholders to a full and fair disclosure of all material facts which would affect corporate elections by proxy. • • • And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case."

The opinion of the Seventh Circuit was buttressed by the opinion of the Supreme Court. In *Borak* v. *J. I. Case,* 377 U.S. 426, 432 (1964), the Court stated:

> "• • • The appropriate remedy to provide the needed supplement (to Commission Action) is not to be limited to prospective relief but is to embrace all necessary remedial relief."

A rereading of the *Borak* opinion, and of briefs submitted by counsel at my request, indicates to me that I must determine whether there was a causal connection between the finding that there has been a violation of the disclosure requirements of §14(a) and the alleged injury to the plaintiffs before I or a Master may look into the question of appropriate remedial action.

As the Supreme Court stated in the *Borak* opinion (*Ibid.*, at p. 431: "* * * But the causal relationship of the proxy material and the merger are questions of fact to be resolved at trial."

Subsequent to the *Borak* decision, a number of authorities reassert the need for an inquiry on the issue of causal connection. *Barnett* v. *Anaconda*, 238 F. Supp. 766 (1965); *Hoover* v. *Allen*, 241 F.Supp. 213 (1965); *Eagle* v. *Horvath*, 241 F.Supp. 341 (1965). See also: "Private Actions and the Proxy Rules: The Basis and Breadth of the Federal Remedy", 31 U. Chi. L. R. 328 (1964) and Note in 78 Harvard L. R. 296 (November 1964).

A determination of causal connection cannot be made on the basis of the evidence before me at this time, and I am convinced that the inquiry on this issue more properly should be heard by the Court rather than as part of a reference to a Master.

The action taken by this Court in the memorandum opinion and order of November 15, 1965, was a specification of facts appearing without controversy relating to Count II of the amended and supplemental complaint, pursuant to Rule 56(d) of the Federal Rules of Civil Procedure. Rule 56(d) states:

"Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly."

In view of the foregoing, I shall commence proceedings at 11:00 A.M., on March 2, 1966, in order to hear evidence on whether there is in fact a causal connection between the violation of the disclosure requirements of Rule 14(a) and the alleged injury to the plaintiffs. My order of November 29, 1965, appointing a Master shall be held in abeyance pending resolution of the issue of causal connection. The hearing to commence on March 2, 1966, constitutes such further proceedings at this time which, in accordance with the language of the Rule above quoted, I find to be just.

Since no final order has been entered in this case, defendants' motion to vacate the Court's order of November 15, 1965, is premature. For the same reason, defendants' motion that I amend my orders pursuant to the provisions of Title 28, §1292(b) must be denied. *Biggins* v. *Oltmer Iron Works,* 154 F.2d 214 (7 Cir. 1946); *Commonwealth Insurance Co. of New York* v. *O. Henry Tent & Awning Co.,* 256 F.2d 200 (7 Cir. 1959).

It Is So Ordered.